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In the Supreme Court of the United States

OCTOBER TERM, 1994

PETE STOLLINGS, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying under the Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, the portion of an attorney's fee that would have applied a contingency multiplier to the attorney's customary billing rate to account for the risk of loss.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported, but the decision is noted at 43 F.3d 1468 (Table). The decisions of the Benefits Review Board (Pet. App. 4a-8a) and the administrative law judge (9a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1994. A petition for rehearing was denied on January 10, 1995. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on April 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act of 1972 (BLBA), 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their surviving dependents based on total disability or death due to pneumoconiosis arising out of coal mine employment. The BLBA is administered by respondent, to whom the Secretary of Labor has delegated administrative functions under the BLBA. Respondent awards benefits after adjudication by a district director and after review (if requested) by an administrative law judge (ALJ), the Benefits Review Board, and a federal court of appeals. See 30 U.S.C. 932(a); 20 C.F.R. 725.101(a)(11); *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 717 (1990).

During those proceedings, a claimant may be represented by an attorney. 20 C.F.R. 725.362, 725.363. A successful claimant is entitled to an award of a "reasonable attorney's fee." 30 U.S.C. 932(a) (incorporating 33 U.S.C. 928(a)); see *Triplett*, 494 U.S. at 717. Regulations promulgated by respondent invalidate all contractual fee arrangements between attorneys and claimants, and counsel for unsuccessful claimants receive no fees for their services. 20 C.F.R. 725.365, 802.203(f); see *Triplett*, 494 U.S. at 718. Instead, an attorney who seeks fees for services performed on behalf of a successful claimant must file an application with the appropriate tribunal for a fee "reasonably commensurate with the necessary work done," taking into account, *inter alia*, "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, [and] the level of proceedings to which the claim was raised." 20 C.F.R. 725.366(b), 802.203(e); see *Triplett*, 494 U.S. at 718. The application must include the attorney's

"customary billing rate," as well as "a complete statement of the extent and character of the necessary work done." 20 C.F.R. 725.366(a); see 20 C.F.R. 802. 203(d).[1]

2. After petitioner prevailed on the merits of his benefits claim, his attorney filed a motion for fees at an hourly rate of $250. Pet. App. 2a, 9a. The attorney explained that in BLBA cases, he uses a base rate of $125 per hour to account for the specialized knowledge necessary to prosecute claims, the complexity of the issues and the level of the proceedings, and then doubles that rate in order to "incorporate[] a 50% risk factor [of losing]." *Id.* at 12a. Respondent objected to the amount of the fee request, arguing that this Court's decision in *City of Burlington* v. *Dague*, 112 S. Ct. 2638 (1992), foreclosed enhancing the "lodestar" amount (*i.e.*, the reasonable hourly rate multiplied by the reasonable number of hours expended) by applying a 200% multiplier to the standard hourly rate. Pet. App. 10a. The ALJ, however, construed the request not to be seeking a multiplier, but rather as asserting an established $250 rate "for *all* black lung cases." *Id.* at 11a. On that basis, the ALJ found the requested fees "perfectly proper under [*Dague*] and consistent with the lodestar method of determining attorney fee awards." *Id.* at 12a.

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[1] In this case, the Black Lung Disability Trust Fund, rather than the responsible coal mine operator, assumes liability for payment of statutory benefits, as well as attorney's fees, to successful claimants. 30 U.S.C. 932(j), 934; 20 C.F.R. 725.367; see *Velasquez* v. *Director, OWCP*, 844 F.2d 738, 738-739 (10th Cir. 1988). The Trust Fund is a Treasury account financed by the coal-mining industry through an excise tax on coal and is administered by respondent. 30 U.S.C. 934; see 26 U.S.C. 4121, 9501.

3. The Benefits Review Board modified the ALJ's decision by reducing the approved hourly rate to $125. Pet. App. 4a-8a. The Board held that "fee-shifting statutes do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent-fee basis." *Id.* at 7a. It reasoned that the practice of the attorney in this case of increasing his hourly rate "by a contingency multiplier of 2 * * * achieve[s] the same result * * * [as] improperly multipl[ying] [the] lodestar fee by a factor of 2." *Ibid.* Because the request thereby "reflects an hourly rate adjusted to account for the contingent nature of the [attorney's] fee," it was "excessive and in violation of" *Dague*. *Id.* at 8a.

4. The court of appeals affirmed. Pet. App. 1a-3a. Relying on its decision in *Broyles* v. *Director, OWCP*, 974 F.2d 508 (1992), which had applied the holding of *Dague* to the BLBA fee-shifting provision, the court affirmed the Board's refusal to enhance the lodestar fee to account for the contingent nature of the fee. *Id.* at 3a. The court of appeals also rejected petitioner's related argument that his attorney's reasonable hourly rate should be multiplied by two because of the contingent nature of the fee award, since the attorney would thereby "achiev[e] the same result he would have, had he improperly multiplied his lodestar fee by a factor of 2." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner was not entitled to double his attorney's fees due to their contingent nature. That ruling does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner argues (Pet. 4-9) that he is entitled to a 200% multiplier of his attorney's fees due to the contingent nature of the attorney's fee system under the BLBA. In *City of Burlington* v. *Dague*, 112 S. Ct. 2638 (1992), this Court held that statutes that provide for a prevailing party to obtain "reasonable" attorney's fees do not permit an enhancement for contingency. The Court found "a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue." *Id.* at 2643. First, just as the statutory language limiting fees to "prevailing" parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss. *Ibid.* Second, this Court has generally adopted the lodestar model, which determines a reasonable fee by multiplying the reasonable hours times a reasonable rate, rather than the contingent-fee model. *Ibid.* Finally, "the interest in ready administrability that has underlain [the Court's] adoption of the lodestar approach, and the related interest in avoiding burdensome satellite litigation * * *, counsel strongly against adoption of a contingency enhancement," which is more complex and more litigable. *Ibid.* (citation omitted).

While the fee-shifting provisions at issue in *Dague* were part of the Solid Waste Disposal Act, 42 U.S.C. 6972(e), and the Clean Water Act, 33 U.S.C. 1365(d), this Court made clear that its "case law construing what is a 'reasonable' fee applies uniformly to all" fee-shifting statutes using similar language. 112 S. Ct. at 2641; see *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983). The courts of

appeals have consistently applied the rule of *Dague* in a wide variety of statutory settings.[2]

Petitioner suggests (Pet. 6-7) that fee shifting under the BLBA is different because settlements are not allowed in black lung cases and attorneys are precluded from charging their clients attorney's fees. See 20 C.F.R. 725.365, 802.203(f); *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 718 (1990). The objections to a contingency multiplier outlined by this Court in *Dague*, however, were based not on the potential existence of additional fee agreements between attorney and client, but on the language of the statute and the difficulties of implementing such a system. But cf. *Price* v. *Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 328 (7th Cir. 1992). Moreover, to the extent the balance of interests is affected by the Director's regulations that implement the fee-shifting provision and preclude private fee agreements, the Director's interpretation of those regulations is entitled to deference. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

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[2] See, *e.g.*, *Davis* v. *Mutual Life Ins. Co.*, 6 F.3d 367, 381 (6th Cir. 1993) (Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*), cert. denied, 114 S. Ct. 1298 (1994); *Hukkanen* v. *International Union of Operating Eng'rs*, 3 F.3d 281, 287 (8th Cir. 1993) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*); *Eirhart* v. *Libbey-Owens-Ford Co.*, 996 F.2d 846, 852 (7th Cir. 1993) (same); *McKenzie* v. *Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1186 (11th Cir. 1993) (same); *Cann* v. *Carpenters' Pension Trust Fund*, 989 F.2d 313 (9th Cir. 1993) (Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*); *Gusman* v. *Unisys Corp.*, 986 F.2d 1146, 1148-1151 (7th Cir. 1993) (Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*); *Lipsett* v. *Blanco*, 975 F.2d 934 (1st Cir. 1992) (42 U.S.C. 1988); *Broyles* v. *Director, OWCP*, 974 F.2d 508 (4th Cir. 1992) (BLBA).

Nor is the denial of a contingency multiplier inconsistent with this Court's decision in *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715 (1990). In *Triplett*, the Court considered the BLBA fee-shifting scheme in the context of a due process challenge and did not rule on the propriety of enhanced fee awards under the BLBA. The Court did note, in passing, that "the Benefits Review Board has construed the regulations of the Secretary of Labor governing the award of attorney's fees to permit consideration of the attorney's risk of going unpaid." *Id.* at 726 (citing *Risden* v. *Director, OWCP*, 11 Ben. Rev. Bd. Serv. (MB) 819, 824 (1980)). The opinions of the Board, however, are not entitled to deference, see *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1287 (1995); *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), and, in any event, the Board's decision in *Risden* predated this Court's decision in *Dague*, which the Board now follows. Pet. App. 7a-8a. Moreover, the Director's interpretation of the BLBA's attorney's fee provision and the implementing regulations, which are entitled to deference, have consistently opposed contingency enhancements post-*Dague* where, as here, the Black Lung Disability Trust Fund has become liable for payment of attorney's fees. See, *e.g.*, *Browning* v. *Director, OWCP*, No. 92-1144-BLA (Ben. Rev. Bd. Jan. 25, 1994) (Pet. App. 37a n.3).

2. Petitioner argues (Pet. 9-10) that even if contingency cannot be used to enhance the lodestar, contingency can be used in calculating an attorney's reasonable hourly billing rate. A "reasonable hourly rate" is determined by looking at the rates prevailing in a particular community for "similar services by lawyers of reasonably comparable skill, experience,

and reputation." *Blum* v. *Stenson*, 465 U.S. 886, 896 n.11 (1984); see also 20 C.F.R. 725.366(b), 802.203(e). Petitioner's attorney conceded below (Pet. App. 12a) that his $125 hourly rate already accounts for "the specialized expertise required in federal black lung law, the level of the proceeding, and the fact that federal black lung claims raise complex factual and legal issues."

The courts of appeals that have considered the question agree that it is "immaterial whether the consideration of contingency occurs in deciding to apply a multiplier to the lodestar fee or in initially calculating the lodestar" because *Dague* "dictates that contingency not be a factor in the setting of billing rates." *Davis* v. *City & County of San Francisco*, 976 F.2d 1536, 1549 (1992), vacated in part on other grounds, 984 F.2d 345 (9th Cir. 1993); see also *Barrow* v. *Falck*, 977 F.2d 1100, 1105 (7th Cir. 1992) ("A premium [billing] rate for civil rights cases, applicable only when the other side is paying, looks like nothing so much as a disguised multiplier."); cf. *Jeffers* v. *Clinton*, 992 F.2d 826, 830-831 (8th Cir. 1993). No court of appeals that has considered this question has permitted the circumvention of the logic of *Dague* proposed by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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